2021 National Conference of State Tax Judges
Case Law Update and Discussion Topics
Wednesday, October 6, and Thursday, October 7, 2021

Links to all publicly available cases can be found on the Lincoln Institute conference webpage.

Local Property Tax Cases

A. Exemptions and Abatements

In re: City of Berlin, BTLA Docket No. 29285-19OS (March 13, 2021). Submitted by Theresa Walker, Member, New Hampshire Board of Tax and Land Appeals.

This appeal presented the issue of what constitutes a conflict of interest by public officials responsible for setting assessments. More specifically, the board was asked to decide whether abatements granted by the City of Berlin's three-member Board of Assessors (BOA) to themselves and to a family member should be set aside. The board is authorized by statute (RSA 71-B:16, III) to order a reassessment of taxes previously assessed "when it comes to the attention of the board from any source…that a particular parcel of real estate…has not been assessed, or that it has been fraudulently, improperly, unequally, or illegally assessed."

Berlin is in an economically depressed region of northern New Hampshire and has one of the highest tax rates in the state. In late 2018, under some pressure from the city manager and mayor, the BOA approved new assessed values resulting from a hastily conducted statistical update by an assessing firm. The update was completed in order to capitalize on improving residential property values and keep the City's tax rate below $40 per $1,000 of assessed value.

In early 2019, the BOA granted abatements to each of its three members for tax year 2018, as well as one to the son of one of the members. When the BOA discussed the abatement applications publicly, the individual board members recused themselves but remained in the hearing room during the deliberations on their individual applications. Prior to granting these abatement applications, the BOA did not bother to ask the City's contract assessing firm to review the abatement applications or to conduct physical inspections as they had routinely done before ruling on other taxpayer abatement applications. In granting abatements on their own properties, the BOA made numerous ad hoc changes on the property record cards, including neighborhood code, view factor, etc., which were inconsistent with neighboring properties. In each instance, the abatements granted were to levels below the 2017 assessments that were in effect prior to the 2018 statistical update.

The NH Department of Revenue Administration (DRA) was granted intervenor status and filed a report and presented testimony concluding the abatements were not supported by market value evidence and resulted in disproportionality. During the DRA's investigation prior to filing their report, it was repeatedly denied requests to inspect to the BOA members' properties.

The BOA members testified, and their law firm argued there were no clear statutory or other directives on how public officials should act with respect to their own abatement applications. The board disagreed, finding the BOA's actions did not comply with numerous standards, guidelines, and principles regarding the responsibilities of serving as public officials. These included various disqualification statutes for public officials (including RSA 43:6, RSA 43:7, and RSA 43:8). The board also cited its own recusal rule (Tax 201.40), which relies on New Hampshire case law to the following effect: "The test for the appearance of partiality is an objective one, that is, whether an objective, disinterested observer, fully informed of the facts, would entertain significant doubt that justice would be done in the case" (See *Taylor-Boren v. Isaac*, 143 N.H. 261, 268 [1998]).

The board ultimately found the abatements granted to the BOA members and a family member were illegal and resulted in disproportionate assessments. The board ordered the abatements repaid to the City, along with statutory interest, for tax year 2018 and subsequent years. The BOA members complied with the order and promptly resigned. The City hired a new contract assessing firm charged with reviewing all abatements granted by the BOA to ensure those properties are assessed consistently with other properties throughout the City.

Eleonora Porobic v. Town of Bartlett, BTLA Docket No. 29283-18PT (April 30, 2021; reh'g denied June 11, 2021). Submitted by Al Shamash, Member, New Hampshire Board of Tax and Land Appeals.

This tax abatement appeal presents the question of whether tax judges can act in a manner perceived by one party to be like "King Solomon" when presented with conflicting appraisal/assessment evidence (based on this famed monarch's inclination to "split the baby in half").

The taxpayer claimed her land was overassessed on the sole ground the town had overestimated the contributory value of her "view" in tax year 2018. The taxpayer's appraiser estimated a $270,000 market value (for both the land and the house) and opined in her testimony at the hearing that the contributory value of any view in that town for any residential property was in a tight fixed range ($25,000 to $30,000, "regardless of the type, quality or other attributes of the view"). The town's assessor disagreed and presented contrary evidence of sales showing a much larger and diverse range of contributory values depending on the subject matter of the view (mountain range or hills, for example) and other attributes such as width, depth, and distance (supported by photographs). The town employed a land residual technique to quantify the contributory value of views.

The board made its own findings after reviewing the conflicting evidence presented and questioning the plausibility of the appraiser's insistence that the value of views in the market did not differ materially between properties. The board granted the appeal, finding that the contributory value of the view was $90,000 instead of the lower amount of $30,000 claimed by the taxpayer's appraiser or the higher amount, $153,000, assessed by the town.

Although the taxpayer "won" an abatement (reducing her total assessment from $408,400 to $345,400), her attorney appealed the board's decision to the New Hampshire Supreme Court. A key contention in that appeal, still pending, is that the board erred and acted 'unlawfully' by "playing Solomon" in arriving at a finding somewhere between the market value estimates of the taxpayer and the town instead of accepting the estimate of the taxpayer's appraiser in its entirety and without adjustment. The board denied the taxpayer's rehearing motion because it does not believe it is obligated to make an either/or factual finding on market value when presented with conflicting evidence and can find a value between those argued by the parties in a tax appeal.

B. Discovery

Scott Salisbury v. Department of Revenue, OTR, Oregon Tax Court Case No. 5400 (April 8, 2021). Submitted by Robert T. Manicke, Judge, Oregon Tax Court.

This property tax valuation case raises the age-old issue of taxpayer sensitivity to a county assessor's request to inspect the property. The taxpayer, a state police officer with construction experience, built a family home in a rural area, along with a horse barn and riding arena. During the first three years of construction, he initially allowed the county assessor's staff to view the property, although he declined to allow any photographs to be taken because of concerns about his family's safety if pictures of his property were to become publicly available.

At one point, however, he began reviewing the assessor's records for his property and determined that the assessor had made errors in prior years that inflated the value on the roll. He pursued an administrative appeal, and at the hearing he learned that the assessor's staff had photographed his property during a visit attended by the taxpayer's wife. At this point, the taxpayer expressed dissatisfaction with the assessor's competence and questioned whether the assessor was performing his duties in good faith. The taxpayer, who refused to allow any further inspection, lost at the administrative level and commenced the first of two appeals to the Magistrate Division.

In the taxpayer's first Magistrate Division appeal, on the county's request to inspect the property, Magistrate Davis offered to craft a protective order that would keep photographs and other sensitive records filed under seal with the court. The taxpayer declined this approach as inadequate to his security needs. Magistrate Davis then granted the assessor's motion to dismiss, in effect upholding the assessment, and the taxpayer did not pursue a further appeal of the tax year at issue.

The taxpayer did, however, file a new appeal of the next year's assessment. In this second Magistrate Division appeal, the taxpayer stated at a hearing that he would not allow any inspection, and he failed to comply when the court ordered him to arrange for an inspection. The assessor moved to dismiss, citing an email from the taxpayer that stated: "Obviously, this case will be dismissed by Magistrate Lundgren and we will file an appeal with the Regular Division." The Magistrate granted the assessor's motion to dismiss for failure to comply with the court's order. This time, the taxpayer did appeal, expecting to argue in the Regular Division for a reduced property value without any need for an inspection.

In the Regular Division opinion, the main substantive message is that the court is likely to grant a county assessor's request to inspect the property in order to prepare for trial because an inspection typically is reasonably necessary to enable the assessor to present his or her best case. Instead of opposing a reasonable inspection request, the taxpayer should focus on preparing his or her own best case for trial. This enables the adversarial process to function as intended: as a check on the assessor's authority to set property values each year.

Much of the opinion involves a procedural point that is likely unique to Oregon: whether a taxpayer who refuses to comply with a magistrate's order can still get a *de novo* trial on the merits when appealing to the Regular Division as the next level of the Tax Court. Building on prior opinions, this opinion seeks to make clear that the answer is no. The Regular Division's review is limited to deciding anew whether to uphold the dismissal in the Magistrate Division. To hold otherwise would encourage litigants to "blow off" the Magistrate Division, thwarting the intention of the legislature in creating the Magistrate Division as the first instance of judicial review.

C. <u>Valuation</u>

<u>Convention Headquarters Hotels v. Marion County Assessor</u>, N.E.3d, Indiana Tax Court (May 21, 2021). Submitted by Martha Blood Wentworth, Judge, Indiana Tax Court.

Convention HQ owns a 4.382-acre parcel of land in Indianapolis. In 2008, Convention HQ broke ground on the hotel now known as the JW Marriott Indianapolis. On the 2010 assessment date, the hotel building was only partially complete. The assessor used a "percentage complete" factor to value the hotel. Convention HQ appealed, alleging the 2010 assessment violated the Equal Protection and Due Process clauses of the 14th Amendment to the U.S. Constitution, its civil rights under 42 U.S.C. § 1983, the Indiana Constitution's Property Taxation and Equal Privileges and Immunities clauses, and that its <u>land</u> assessment contravened Indiana's market value-in-use standard. Neither of the taxpayer's administrative appeals were timely heard, and it filed a direct appeal with the Tax Court, where it was heard *de novo*.

Both parties filed partial motions for summary judgment (SJ). In its motion, Convention HQ limited its claims to its improvements, alleging the assessor violated its federal rights to equal protection and due process and its state rights under the Privileges and Immunities and the Property Taxation clauses. Central to each of these four claims is whether, from at least 2006 through 2019, the assessor pursued a practice, custom, or policy of selectively assessing certain partially complete commercial buildings but did not assess other partially complete commercial buildings until they were fully constructed.

Convention HQ designated property record cards for all commercial properties under construction and incomplete on any assessment date from 2006 to 2019; seven showed an assessed value, but **<u>all</u>** the others showed a zero in the "percentage complete" column. Convention HQ claimed the reasonable inference is that **only the seven incomplete** properties with an assessed value on their property record card were actually "assessed," while all the other 55 incomplete properties were not.

The assessor designated an affidavit from a deputy assessor claiming the 55 zero-valued properties **had been assessed** every year. Citing the Indiana Supreme Court, which has adopted a more lenient SJ standard that the feds, a non-movant's self-serving affidavit may preclude summary judgment when it claims material facts, not merely legal issues, are in dispute. The material fact whether all partially complete properties were assessed is thus in dispute, and the Tax Court denied taxpayer's motion.

The assessor's motion claimed favorable judgment on the federal 1983 claim because, among other things, he has absolute immunity and Convention HQ had not met the federal *Monell* pleading requirements. Officials acting in a judicial capacity are entitled to absolute immunity against 1983 actions, and for the same policy reasons, non-judicial officers performing quasi-judicial functions also enjoy immunity. Other governmental officials, however, receive immunity protection derivative of immunity afforded their employer, here a municipal corporation. Because there is no immunity for municipal corporations and the assessor was sued in his official capacity, the assessor is not entitled to absolute immunity. Moreover, the claim that the taxpayer did not follow the federal pleading requirements also failed as a matter of law because Indiana's state court pleading requirements merely require "notice pleading," unlike the federal courts, which was satisfied here. Neither party's motion for partial summary judgment was granted, and the case has been set for trial to determine whether the partially complete properties with zero assessed values on an assessment date were "assessed."

Margaret Rush v. Town of West Hartford, Docket No. HHB-CV-18-6044898-S, Superior Court of Connecticut (June 3, 2020). Submitted by Arnold W. Aronson, Judge Trial Referee, Connecticut Tax and Administrative Appeals.

This case involves a 2017 tax appeal of an irregular shaped level site that has street frontage and seventy feet of lakeside frontage. The site straddles the West Hartford/Farmington town line with approximately two-thirds of the site located in West Hartford and one-third located in Farmington. The one-third portion of the site, which is not part of this appeal, has frontage on Woodridge Lake.

The assessor determined that the subject property, as of October 1, 2016, had a fair market value of $375,000. The town's appraiser's opinion of fair market value was $245,846, approximately $130,000 lower than the assessor's valuation. The plaintiff's appraiser's opinion was that the West Hartford part of the subject property had a fair market value of $139,555. Logically, if the Town of West Hartford had to foreclose on a tax lien for non-payment of taxes, the Town would only obtain possession of the two-thirds portion of the site, thereby losing the lake frontage portion located in Farmington.

In arriving at his valuation of $139,555, the plaintiff's appraiser selected four sales, none of which had any similarity to the subject property. The lack of comparability led him to adjust each sale by over 50 percent.

According to the Town's appraiser, there were no sales of unimproved waterfront lots in West Hartford or neighboring towns that could be used as a comparable to the subject property. He arrived at a fair market value by selecting improved properties, two of which were lakeside.

Despite the subject property's deficiencies, such as a sewer lift station with its attendant noise being emitted from its operation and the lack of access to the lake, the Town's appraiser expressed his opinion, which the court found to be lacking credibility, as follows: "No unfavorable factors affecting marketability or appeal . . . No known or observed adverse environmental conditions noted at the time of the inspection . . ."

The court (Judge Arnold Aronson) arrived at its own conclusions of value, weighing the opinions of the appraisers, the claims of the parties, the evidence introduced, and the court's own general knowledge of the elements going to establish value. Given all these factors, the court concluded that the fair market value of the subject property on the date of revaluation was $200,000.

Eagle Rock Convalescent Center v. Township of West Caldwell, 32 N.J. Tax 122 (Tax 2021), 2021 N.J. Tax LEXIS 2 WL 57856 (January 6, 2021). Submitted by Christine Nugent, Judge, Tax Court of New Jersey.

Trial decision involving real property tax appeals for a skilled nursing home for years 2008 through 2014. Value was presented under the income and cost approaches. While nursing homes are considered income producing properties, the income approach is problematic since the facilities are most often owner-operated, resulting in a lack of market leases.

The taxpayer's expert relied on evidence to show that industry-wide, Medicaid reimbursement comprises over 50 percent of a nursing home's total income, and that the Medicaid reimbursement rate will steadily decrease. Medicaid pays the least per resident bed out of the three sources of income (private pay, Medicare, and Medicaid). On that basis, the taxpayer's expert opined that the impact of Medicaid on revenue warranted the income approach. The court found that the expert's opinion under the income approach was unreliable because of (1) the expert's inability to separately allocate value among the realty versus the value of its business; (2) variables in Medicaid and Medicare rates from county to county; (3) evidence of varying Medicaid reimbursements from year to year; and (4) the lack of credible evidence that the expenses represented the market.

Using the cost approach (NJ's accepted valuation method for nursing homes), both parties' experts utilized the Marshall & Swift SwiftEstimator computer program to derive the improvement's replacement cost new. At trial, both experts revised their testimony and produced a second summary computer report based on the revisions. Examination of the revised reports showed that the program calculated a higher base unit cost in the second report even though the relevant inputs remained the same as the first. The court held that, without the underlying data and calculations utilized by the computer program, it was unable to accept the software program as a valid and reliable method or analysis or to rely on the unit-cost estimate produced by the program.

In calculating depreciation, the taxpayer's expert sought to persuade the court that Medicaid serves as a form of external or economic obsolescence. The court found no support for the expert's position. The court acknowledged that affordable housing regulations can affect a property's value, but no evidence was presented for the court to find that the Medicaid reimbursement rate governed, restricted, or limited the ownership or transfer of the subject property. The court also rejected any comparison between Medicaid and rent control, finding that rent control restricts an owner from collecting market rent as a matter of public policy, while Medicaid is a form of government-controlled health insurance that serves as a guaranteed source of nursing home revenue. The court also found the expert's theory for the method used to calculate the deprecation was flawed. Based on the foregoing, the court was unable to find value on five of the seven years under appeal.

For the 2011 and 2012 appeals, the municipality produced a second expert due to a municipal wide revaluation. Employing the cost approach, that expert utilized the Marshall & Swift cost calculator and derived an opinion of replacement cost new and depreciation by manual calculation using the Marshall & Swift cost manuals. The court found that the testimony was reliable. On that basis, the court arrived at value for those two years and determined that the value was within range. The court affirmed the assessments for all years under appeal.

Southlake Indiana v. Lake County Assessor, 160 N.E.3d 1156, Indiana Tax Court (December 8, 2020). Submitted by Martha Blood Wentworth, Judge, Indiana Tax Court.

The assessor increased the 2014 assessment of the Southlake Mall, located in Hobart, Indiana, more than 5 percent over its 2013 assessment and applied the increase retroactively. Both Southlake and the assessor presented USPAP appraisals with different market-value-in-use values for each year, and the Indiana Board of Tax Review issued its final determination, not adopting either party's appraised values, but accepting and rejecting parts of each party's appraisal—splitting the baby:

	Original AV	Increased AV	Southlake	Assessor	Indiana Board
2011	$110m	$239m	$ 98m	$244m	$173m
2012	$110m	$239m	$115m	$239m	$180m
2013	$110m	$239m	$130m	$227m	$180m
2014	$110m	$239m	$146m	$243m	$191m

On appeal to the tax court, Southlake argued the final determination should be reversed because the board's value failed in many ways, including its failure to review each appraisal on a stand-alone basis under the "Burden Shifting Statute," which states that the assessor who increases an assessment by more than 5 percent over the prior tax year has the burden of proving that the assessment **is correct** in any review or appeal under this chapter and in any appeals taken to the Indiana Board Of Tax Review or to the Indiana Tax Court. If a county assessor or township assessor fails to meet the burden of proof under this section, the taxpayer may introduce evidence to prove the correct assessment. If neither the assessing official nor the taxpayer meets the burden of proof under this section, the assessment reverts to the assessment for the prior tax year, which is the original assessment for that prior tax year or, if applicable, the assessment for that prior tax year. I.C. 6-1.1-15-17.2(b).

After meticulously reviewing each appraisal, the tax court reversed in part and affirmed in part, stating that Southlake merely asked the court to reweigh the evidence and come to a different decision from that of the Indiana Board. Regarding the Burden Shifting Statute, however, the tax court noted the parties each presented a *prima facie* case and to apply the rigid formalistic approach advocated by Southport would remove the Indiana Board's ability to resolve any issues arising from conflicting evidence.

Southlake Indiana v. Lake County Assessor, N.E. 3d, Indiana Tax Court (September 22, 2021). Submitted by Martha Blood Wentworth, Judge, Indiana Tax Court.

The Indiana Supreme Court reversed the tax court, holding that it did not properly apply the Burden Shifting Statute because it did not (1) review each appraisal on its own merits to determine whether it met the burden of proof; (2) require one party to meet the burden of proof but required only that they present probative evidence for the Indiana Board to weigh; (3) require either party to prove its assessment was "**correct**;" or (4) understand that the Burden Shifting Statute took the BOP out of the normal flow (i.e., general rule).

D. Constitutional Objection to Assessment/Jurisdiction

Walmart v. Winona County, 2021 WL 3641445, N.W.2d (August 18, 2021). Submitted by Jane Bowman, Judge, Minnesota Tax Court.

The Minnesota Supreme Court recently ruled on the scope of Minnesota Statute Section 278, which is the chapter addressing tax appeals. Although this case was never heard in the tax court, the supreme court ruled that constitutional claims challenging a property tax assessment are encompassed by chapter 278, and thus subject to the time limitations stated within the statute. This case means a taxpayer must use the tools/claims in chapter 278 when challenging tax assessments and cannot bring separate constitutional challenges outside of the statutory limitations.

E. Standing – "Aggrieved Party"

B & D Assoc. v. Township of Franklin, 32 N.J. Tax 81 (2020), 2020 N.J. Tax LEXIS 14 WL 6389983 (October 26, 2020). Submitted by Mary Siobhan Brennan, Judge, Tax Court of New Jersey.

Township filed a summary judgment motion seeking to dismiss the taxpayer's 2017 and 2018 complaints for lack of standing on the basis that the taxpayer was not an aggrieved party. The taxpayer purchased the property in 2008 with a bank loan secured by a mortgage on the property. In 2012, the taxpayer defaulted on the loan and the bank moved to foreclose. A judgment of foreclosure was entered in July 2014. The taxpayer filed a Chapter 11 bankruptcy petition in November 2014, which stayed the enforcement or execution of the foreclosure judgment.

The taxpayer and bank reached an agreement on reinstatement of the loan whereby the taxpayer's tenant was to make rent and tax payments into a lockbox from which the bank could withdraw mortgage and escrow payments. The tenant ceased to make payments in 2015, and the taxpayer did not satisfy any payment obligations to the bank. To protects its interests, the bank began making the real property tax payments.

The bank purchased the property at sheriff's sale in June 2018 but did not take title to the property. Rather, it assigned its property rights to another related entity. The deed was electronically recorded on August 21, 2018.

In denying the township's motion, the court held that by virtue of holding title to the property, the titleholder maintains independent standing as an aggrieved taxpayer even if it is not making any direct or indirect payments of the taxes.

State Tax Cases

A. **Jurisdiction**

Appeal of Savage, 2020-OTA-328**.** Submitted by Cheryl L. Akin, Presiding Administrative Law Judge, and Kristen Kane, Chief Counsel, California Office of Tax Appeals.

This case addresses the issue of whether the Office of Tax Appeals (OTA) has jurisdiction to resolve bankruptcy matters. Appellant was the chief executive officer of a corporation that had unpaid sales tax liabilities, including penalties and interest, when it terminated. After the termination, appellant filed for Chapter 7 bankruptcy protection and was granted a standard discharge. After the bankruptcy matter was resolved, the California Department of Tax and Fee Administration (the agency which administers California's sales and uses taxes) determined that the CEO was personally liable as a responsible person for Bella Famiglia, Inc. (BFI)'s unpaid sales tax liabilities within the meaning of California Revenue and Taxation Code section 6829.

On appeal, the CEO contended that his personal liability for the corporation's unpaid penalties were discharged in the Chapter 7 Bankruptcy. In its opinion, the OTA noted that it is charged with resolving appeals involving California taxes and does not have statutory authority to resolve contests as to dischargeability under the federal Bankruptcy Code. Instead, contests as to dischargeability of a tax debt may be raised in state court or in the bankruptcy court. The OTA is not a court. The Panel concluded that the OTA lacks jurisdiction to decide whether a proposed assessment was discharged in bankruptcy. In so doing, the OTA further concluded that the precedential decision of the Board of Equalization in *Appeal of Willet* (76-SBE-073), 1976 WL 4089, shall be overturned to the extent of any inconsistency.

B. **State Income Tax – Domicile**

Appeals of Cremel and Koeppel, 2021-OTA-222P. Submitted by Cheryl L. Akin, Presiding Administrative Law Judge, and Kristin Kane, Chief Counsel, California Office of Tax Appeals

This appeal involves community property and nonresident sourcing issues. Cremel and Koeppel (appellants), husband and wife, moved to California from France in 1998. In 2001, Cremel began working for VMware in California. Cremel was paid in part with stock options, which he exercised in 2011 and 2012. The stock options were community property, so one-half of the income earned on the exercise of the options was attributable to Koeppel. Koeppel had moved back to France in 2008 and was a nonresident of California when this income was earned in 2011 and 2012. Cremel remained a California resident. Appellants claimed that Koeppel's one-half community property share of the income was not California source income and therefore should not be subject to California income tax.

The Office of Tax Appeals (OTA) concluded that, in situations such as this, where one spouse is a resident of California and the other spouse is a nonresident of California, the determination of whether an item of income is taxable in California to the nonearning spouse (here, Koeppel) can be broken down into a two-step process. The first step requires a determination of the nonearning spouse's marital property interest in the earning spouse's income. If the nonearning spouse has a marital property interest in the earning spouse's income (here, the parties stipulated that the income was community property), the second step requires a determination of whether the nonearning spouse's interest in such income is taxable in California. The income may be taxable in California either (1) because the nonearning spouse is a resident of California who is taxed on all income, regardless of its source; or (2) because the nonearning spouse is a nonresident of California and the income is California source income. Because under step one, Koeppel is attributed one-half of the income under California community property laws, she is treated, under step two, as if she had derived that income herself from the source from which Cremel derived it. Under California's nonresident sourcing rules, compensation for personal services performed in California is California source income. Since the income was compensation for Cremel's personal services performed in California, that income is California source income in the hands of Koeppel and taxable in California.

C. State Income Tax – *Qui Tam* Attorney Fees

Nicholas L. DePace M.D. v. Director, Division of Taxation, Docket No. 013396-2019, opinion by Cimino, J.T.C. (December 21, 2020). Submitted by Mark Cimino, Judge, New Jersey Tax Court.

Under existing law, gross income tax is due from both the *qui tam* plaintiff and the attorney representing the *qui tam* plaintiff on the portion of the award payable to the attorney as fees. *Qui tam* actions are brought by private citizens on behalf of the government alleging waste and fraud. The private citizen is entitled to an award which constitutes a percentage of the government's recovery. While an argument can be made that only the attorney is liable for gross income tax on the attorney's fee portion of the award, a recent attempt to change the law to only tax the attorney was vetoed by the governor. The court is constrained to respect the legislative process for which the governor is a part.

D. State Taxation – Corporate Business Tax

Express Scripts Incorporated v. Indiana Department of State Revenue, 170 N.E.3d 273, Indiana Tax Court (May 14, 2021). Submitted by Martha Blood Wentworth, Judge, Indiana Tax Court.

Express Scripts, Inc. (ESI) is headquartered in Missouri. Together with its affiliates, ESI is one of the largest pharmacy benefit management companies in North America; its clients include health maintenance organizations, health insurers, third-party administrators, employers, union-sponsored benefit plans, and government health programs. Among other things, ESI provides its clients with (1) access to a network of independent third-party retail pharmacies; (2) formulary design and implementation; (3) drug interaction and utilization reviews; and (4) claims processing and adjudication.

The Indiana Department of State Revenue (DOR) audited ESI, determining it did not remit the proper amount of income tax for 2011 through 2013 because it reported its income as derived from the provision pharmacy benefit management services, not from selling prescription drugs. The distinction is critical because income from the sale of TPP is sourced to the Indiana apportionment sales factor numerator, and is therefore taxed in Indiana, if it was delivered or shipped to a purchaser located in Indiana. On the other hand, receipts from services where the income producing activity was performed both inside and outside of Indiana were sourced to Indiana's numerator according to the cost of performance rule during the years at issue.

The DOR filed a motion for partial summary judgment, and the tax court held that the department was not entitled to judgment as a matter of law because it incorrectly characterized ESI's income as derived from the sale of prescription drugs, rather than the provision of pharmacy benefit management services.

E. State Taxation – Innocent Spouse

Nicholas L. Gentile, Jr. et al. v. Director, Division of Taxation, 32 N.J. Tax 314 (Tax 2021), 2021 N.J. Tax LEXIS 6, 2021 WL 1168914. Submitted by Joan Bedrin Murray, Judge, Tax Court of New Jersey.

The court denied the Director, Division of Taxation's motion for summary judgment seeking to dismiss a complaint challenging the assessment of New Jersey gross income tax (GIT) against an "innocent spouse." The plaintiffs, a married couple filing jointly, failed to report approximately $900,000 in income for tax years 2006 through 2010 that the wife, an accountant, realized from criminal activity allegedly unknown to her husband. The plaintiffs argued the husband should be relieved of joint and several liability attaching to joint GIT filers under N.J.S.A. 54A:8-3.1 (c), citing the equitable remedy afforded to an "innocent spouse" under federal law (26 U.S.C. § 6015). The director contended that, as no such relief is afforded a taxpayer under New Jersey law, plaintiffs' complaint merited dismissal. The director also argued that plaintiffs' joint and several liability for GIT included profit from criminal activity under N.J.S.A. 54A:5-1 (o).

While the plaintiffs' contention that the innocent spouse relief provided under federal law should be applied to their New Jersey assessment was without merit, the court noted that the assessment of GIT and civil fraud penalty was imposed on the plaintiffs after the expiration of the three-year statutory period for assessing GIT under New Jersey law (N.J.S.A. 54A:9-4 (a)). In order to be exempt from the three-year limit, the director must show that a false or fraudulent return was filed with the intent to evade tax. In this case, the court found no proof that the husband filed a false or fraudulent return in order to evade tax for the years in question, nor did the director make this claim in the moving papers. The court cited a prior tax court case, *Anita K. Leather v. Director, Division of Taxation*, 31 N.J Tax 285 (Tax 2019), in holding that joint and several liability of taxpayers filing joint GIT returns does not relieve the director of the burden to prove the statutory exemption under N.J.S.A. 54A:9-4 (c) (1) (B). As the record was not fully developed in this regard, the director's motion for summary judgment was denied.

F. Apportionment/Jurisdiction

Oracle USA, Inc. v. Commissioner of Revenue, 487 Mass. 518I (2021), Massachusetts Supreme Judicial Court (SJC) (May 2021). Submitted by Mark J. DeFrancisco, Member, Massachusetts Appellate Tax Board.

The Massachusetts Supreme Judicial Court (SJC) affirmed the Appellate Tax Board (ATB) in holding that a vendor had a right to apportion sales tax through the normal abatement process despite the vendor's failure to follow the procedures required by the commissioner of revenue's regulation.

The statute at issue provided that the commissioner "may, by regulation, provide rules for apportioning tax in those instances in which software is transferred for use in more than one state." The vendor sold software to a Massachusetts customer who loaded the software on the customer's Massachusetts servers. The vendor collected sales tax on the full purchase price of the software. Later, the customer advised the vendor that the majority of its employees utilizing the software were located outside of Massachusetts. The vendor then filed an abatement application seeking a refund based on an apportioned purchase price representing the percentage of Massachusetts employees using the software.

The commissioner denied the abatement on the ground that the regulation required that apportionment is available only where the purchaser presents to the vendor a "multiple points of use" certificate at the time of purchase or no later than the time the transaction is reported for sales or use tax purposes. The purchaser did not present such a certificate in this case.

The vendor argued that the statute authorizes apportionment and the regulation only provided for circumstances where the vendor was relieved of the duty to collect and remit the tax. The commissioner argued that the use of the word "may" in the statute indicated that the legislature had delegated to the commissioner the determination of whether to allow apportionment of sales tax on software sold in Massachusetts and transferred for use outside the commonwealth.

The SJC rejected the commissioner's argument and upheld the ATB's ruling that the statute allowed for apportionment and a vendor could seek to apportion sales tax previously collected and remitted through the abatement process. The SJC analogized the issue to the statutory procedure governing resale certificates. The resale certificate relieves the vendor from the duty of collecting and remitting sales tax, but the absence of the certificate does not prevent the vendor from later establishing, via the abatement process, that the sale was in fact a sale for resale.

In the present case, because the purchaser provided the vendor with a detailed breakdown of the percentage of its employees located outside of Massachusetts who were using the software, which was not challenged by the commissioner, the SJC upheld the ATB's granting of an abatement based on an apportioned purchase price reflecting that percentage.

Cases and Presenters for 2021 National Conference of State Tax Judges

CA – Cheryl Akin & Kristen Kane – Cremel & Koeppel; Savage
CT – Arnold Aronson – Rush
IN – Martha Wentworth – Southlake Indiana; Convention Headquarters Hotels; Express Scripts
MA – Mark DeFrancisco – Oracle USA
MN – Jane Bowman – Walmart
NH – Albert Shamash – Poroboc v. Bartlett
NH – Theresa Walker – City of New Berlin
NJ – Mark Cimino – DePace
NJ – Christine Nugent – Eagle Rock
NJ – Mary Brennan – B&D Assoc.
NJ – Joan Murray – Gentile
OR – Robert Manicke – Salisbury

Discussion Topics

A. **Mediation.** The benefits/pitfalls of mediation of tax cases in lieu of adjudication. As one article puts it, "the goal of mediation is settlement not victory." Mediation brings the parties together by mutual consent instead of resolving their differences by combat. On the other hand—who mediates? Are the parties acting in good faith? Rates of success? Delay or expediate litigation?

B. **Benefits/burdens of trying appeals of multiple tax years.** How many years of appeals should be the subject of one real estate trial? Does allowing too many years shift the power of one of the parties? Does it benefit one of the parties (interest free loan to municipality? Reduced expenses for retaining experts?). How can we deal efficiently with the different evidence over several different years? At what point do we say this year is too far from year one?

C. **How has the Covid-19 pandemic changed what we do?** What positive implementations are here to stay? What worked, what didn't, and what have we learned? What is ahead in terms of progress or pitfalls? What will be the impact on residential valuations and commercial valuations? How can we best prepare for future appeals affected by the changes that have occurred over last two years?

D. **Unique property valuation.** As more and more land is developed, where do comparable vacant land sales come from? How do you handle situations where both experts agree that there are no comparable sales for a non-income producing property and their best attempt at valuation is a stretch—but in different directions?